SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 659

FRANK ROSS,

Petitioner,

v.

F. E. STANLEY, W. J. BOWEN, HAROLD A. MARTIN, O. PAUL HERZIG, MIDWESTERN CONSTRUCTORS, INC., WALCO ENGINEERING & CONSTRUCTION COMPANY (individually and as joint venturers doing business under the firm name and style of MIDWESTERN-WALCO CONTRACTORS), BARNARD AND BURK PIPELINE ENGINEERING COMPANY, INC., HARBERT CONSTRUCTION CORPORATION, FLORIDA GAS TRANSMISSION COMPANY and FLORIDA GAS COMPANY,

Respondents,

and

JOHN M. HARBERT III, LEON M. PAYNE, THEODORE RINEHART, CHARLES C. BARNARD, JACK S. BURK and PAUL C. WALLACK,

Defendants.

BRIEF OF RESPONDENTS FLORIDA GAS TRANSMISSION COMPANY AND FLORIDA GAS COMPANY OPPOSING PETITION FOR A WRIT OF CERTIORARI

ROBERT F. CAMPBELL
SELBY W. SULLIVAN
2500 Humble Building
Houston, Texas 77002
R. Y. PATTERSON, JR.
Post Office Box 44
Winter Park, Florida
Attorneys for Respondents Florida Gas Company and Florida Gas Transmission Company

Of Counsel:
ANDREWS, KURTH,
CAMPBELL & JONES
2500 Humble Building
Houston, Texas 77002

PRINTED IN U.S.A. — BY DeLARUE/TEXAS

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	4
1. The Petition for a Writ of Certiorari should be denied because the Court of Appeals has not decided an important question of Federal law which has not been, but should be, settled by this Court	4
2. The Petition for a Writ of Certiorari should be denied because the Court of Appeals has not decided an important state question in a way in conflict with applicable state law	5
3. The Petition for a Writ of Certiorari should be denied because the decision of the Court of Appeals does not depart from the accepted and usual course of judicial proceedings	8
CONCLUSION	11

LIST OF AUTHORITIES

Cases

Florida Gas Transmission Company, Florida Public Utilities Commission, Petitioners v. Federal Power Commission, Respondent, Nos. 21957, 22089, and 21964	3
FPC Opinion 301, 16 F.P.C. 118 (1956)	2
FPC Opinion 431, 31 F.P.C. 1402 (1964)	3
FPC Opinion 431-A, 32 F.P.C. 518 (1964)	3
Ross v. Stanley, 346 F. 2d 645 (5th Cir. 1965)	4, 5, 6, 9, 10
Town of Miami Springs v. Lawrence, 102 So. 2d 143 (Fla. 1958)	6, 7

Statutes

Fla. Stat. (1963) 95.11(5)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 659

FRANK ROSS,

Petitioner,

v.

F. E. STANLEY, W. J. BOWEN, HAROLD A. MARTIN, O. PAUL HERZIG, MIDWESTERN CONSTRUCTORS, INC., WALCO ENGINEERING & CONSTRUCTION COMPANY (individually and as joint venturers doing business under the firm name and style of MIDWESTERN-WALCO CONTRACTORS), BARNARD AND BURK PIPELINE ENGINEERING COMPANY, INC., HARBERT CONSTRUCTION CORPORATION, FLORIDA GAS TRANSMISSION COMPANY and FLORIDA GAS COMPANY,

Respondents,

and

JOHN M. HARBERT III, LEON M. PAYNE, THEODORE RINEHART, CHARLES C. BARNARD, JACK S. BURK and PAUL C. WALLACK,

Defendants.

BRIEF OF RESPONDENTS FLORIDA GAS TRANSMISSION COMPANY AND FLORIDA GAS COMPANY OPPOSING PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In 1956, the Respondents and Defendants were among those who had originated and developed the project of Respondent Florida Gas Transmission Company (Transmission) to bring natural gas from Texas to Florida via a

new transmission line (R 56-61). As an integral part of the project which they presented to the Federal Power Commission (Commission) for its required approval, they disclosed the interrelationships between Transmission and the four engineering and construction firms who are Respondents here (Contracting Firms) (R 92-119). They described to the Commission in detail their proposal that the construction of the facilities would be performed by these very firms, provided their prices were no higher than the going rate for similar work (R 111-114). The Commission approved the project and said:

> "Finally, it appears that the labor necessary for construction of the facilities of Houston Gas will be furnished by three construction companies, the president of each of which is an official and director of Houston Gas and that two of these construction companies own blocks of Houston Gas stock. Furthermore, a member of the firm of engineers which will supervise the construction and operation of the pipeline is also a vice president and director of Houston Gas. While as we have already stated, the cost of the proposed facilities appears to be reasonable, in view of this fact, this cost will be carefully scrutinized in any future proceeding dealing with accounting or rates of Houston Gas." *FPC Opinion 301,* 16 F.P.C. 118 at 142 (1956).

Following the public financing, the project was constructed by the Contracting Firms pursuant to contracts negotiated with them by Transmission and approved by its Board of Directors and the Board of its parent, Florida Gas Company, in October, 1958.

While not contesting the fact that the cost of the facilities thus constructed was entirely reasonable (R 33, 38, 93), the Commission, in 1962, attacked the inclusion in Transmission's rate base of payments to the Contracting

Firms to the extent they represented profits earned by the Contracting Firms (R 53-55). As justification for this action, the Commission asserted what it variously characterized as the application of "an old rule [no-profits-to-affiliates] to new circumstances" or a "new rule for determining whether to exclude profits of affiliates . . . ."[1] This action of the Commission is presently pending in the United States Court of Appeals for the Fifth Circuit on Petition to Review.[2]

Petitioner brought suit in August, 1962, against the Contracting Firms and the directors of Transmission, alleging that the directors committed a breach of their fiduciary duty in approving said contracts in 1958, and that the Contracting Firms were thereby unjustly enriched, since they knew or should have known that the Commission at some later date would remove any profits realized by the Contracting Firms from Transmission's rate base by the application of the Commission's so-called "no-profits-to-affiliates" rule (R 44).

Petitioner's suit was dismissed by the District Court on the grounds that the Florida Statute of Limitations barred Petitioner's action as to any claim arising from a breach of fiduciary duty and that, if Petitioner had a claim for unjust enrichment, that claim was premature because the

---

[1] *FPC Opinion 431-A*, 32 F.P.C. 518 at 519, *Petition for Cert.* 82a at 83a (1964).

"We do not object to promoters making a profit on their investment of time, effort and financial resources in a developing pipeline enterprise. . . . What we do object to is the engineering and contracting promoters profiting a second time on contracts between themselves and the organization they are promoting at the expense of the gas consumers." *FPC Opinion 431*, 31 F.P.C. 1402 at 1409, *Petition for Cert.* 30a at 44a-45a (1964).

[2] *Florida Gas Transmission Company, Florida Public Utilities Commission, Petitioners* v. *Federal Power Commission, Respondent*, Nos. 21957, 22089, and 21964, argued on October 20, 1965.

action of the Commission in deleting the profits from rate base was not then final (R 127-31).

The Court of Appeals affirmed the judgment of dismissal but held that the petition asserted only a single cause of action; i.e., one predicated upon a breach of fiduciary duty, and remanded to the Trial Court to allow that Court to amend its judgment accordingly. *Ross* v. *Stanley,* 346 F.2d 645, *Petition for Cert.* 1a (5th Cir. 1965).

ARGUMENT

1. The Petition For A Writ Of Certiorari Should Be Denied Because The Court Of Appeals Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Petitioner's argument at Point I of his Petition for a Writ of Certiorari (pp. 10-19) would lead the reader to believe that this was a suit based on the Federal question jurisdiction of the District Court wherein the District Court and the Court of Appeals had been asked to construe the provisions of the Natural Gas Act. However, to the contrary, the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and the substantive law applicable to this controversy is, and always has been, state law.

Petitioner's cause of action is nothing more or less than a shareholder's derivative action based on a claim that certain directors breached their fiduciary duty to the shareholders of the Corporation. Petitioner's cause of action was dismissed because the Florida Statute of Limitations,[3] which concededly is the applicable statute of limitations,[4] barred his claim. This dismissal was based solely on Flor-

[3] FLA. STAT. (1963) 95.11 (5).
[4] *Ross* v. *Stanley, supra* at 648, *Petition for Cert.* 6a.

ida state law. No interpretation of the Natural Gas Act, the Federal Power Act or any other Federal law was involved in this decision, let alone the ability of the Federal Power Commission to discharge properly its statutory duties. There is thus not only no vitally important question of Federal law for this Court to consider; there is no question of Federal law whatsoever to be settled by this Court.

2. The Petition For A Writ Of Certiorari Should Be Denied Because The Court Of Appeals Has Not Decided An Important State Question In A Way In Conflict With Applicable State Law.

Whereas under prior law a "probable" conflict with state law was one ground for certiorari, Supreme Court Rule 19 omits the word "probable" and requires a definite conflict between the Court of Appeals decision and applicable state law. Petitioner has failed to sustain the burden of showing such a conflict.

None of the parties have disagreed that the applicable statute of limitations is the Florida three-year statute. Nor has there been any disagreement as to the law of Florida on the question of when the limitation period commences to run. As Judge Tuttle's majority opinion in the Court of Appeals stated: "All parties seem to agree that 'limitation never commences to run until the time when the plaintiff could first have maintained his action to a successful result.'" *Ross* v. *Stanley, supra* at 648, *Petition for Cert.* 6a.

The question of Florida law thus becomes: when does a cause of action for a breach of fiduciary duty arise? Both majority opinions and the dissenting opinion are in agreement: it arises upon the "breach of the fiduciary rela-

tionship resulting in injury." The majority held that, in this case, the breach of fiduciary duty alleged was the awarding of the contracts to the Contracting Firms, and the injury alleged was the exposure to the danger that the Commission might remove a portion of the payments to the Contracting Firms from Transmission's rate base. As stated by the Court below:

> "The circumstances alleged to have existed at the time the contracts were executed in November, 1958, unquestionably would have supported a bill in equity for an accounting based on a breach of the fiduciary relationship resulting in injury, the damages from which could not be computed until a later date. Such an action for accounting from allegedly faithless fiduciaries is fully recognized in Florida. *R. O. Holton & Co.* v. *Hull,* 1939, 140 Fla. 687, 192 So. 229. In *Royal Indemnity Co.* v. *Knott,* Fla. 1931, 136 So. 474, 478, the Supreme Court of Florida said '[a]nd it may be said generally that whenever there is a fiduciary relation such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted. The right in such cases is based upon the substantive equity of trusts which jurisdiction equity always had. 1 Ency. Pl. & Pr. 96. . . .'
>
> • • •
>
> "All the breaches of fiduciary duty alleged in the complaint occurred not later than November, 1958. These breaches of fiduciary duty gave rise to the right in the plaintiff to have an accounting made of the damages that would accrue therefrom. The fact that the amount of the damages could not be ascertained until a later date was the very circumstance that required the filing of proceedings of an equitable nature. . . ." *Ross* v. *Stanley, supra* at 649-650, *Petition for Cert.* 9a-10a.

Town of Miami Springs Springs v. *Lawrence,*[5] the only case on this point cited by the dissenting opinion and Peti-

[5] 102 So. 2d 143 (Fla. 1958).

tioner, does not conflict with the above principles. The cause of action there was an action against the town for "damages to property" arising from the overflow of waters onto plaintiffs' land caused by the action of the town in raising the level of an adjoining street. The action of the city in raising the level of the street was proper, and no invasion of the plaintiffs' legal rights occurred until the subsequent overflow. The Court, in dealing with the law applicable to overflow cases, said:

> "And we agree that the better rule *in this class of cases* (suits for damages from overflow of land caused by artificial construction or obstruction) is that the statute does not begin to run until actual harm is inflicted to the plaintiff's land, regardless of the installation date of the construction or obstruction causing the overflow. . . . (Emphasis added.)
>
> • • •
>
> "In the instant case, however, there was no direct invasion of the plaintiffs' property by the raising of the elevation of the street; the 'accident or misfortune' resulting in damage to plaintiffs' property was the overflow onto and impounding of surface waters on plaintiffs' property, and *until that occurred the plaintiffs could not have stated a cause of action for 'damage to property'*. . . ." (Emphasis added.) *Town of Miami Springs* v. *Lawrence, supra* at 145.

In the instant case, the gravamen alleged is a breach of fiduciary duty. As the majority below held, under Florida law, this action as alleged was wrongful *eo instanti,* constituted an immediate invasion of the Petitioner's rights and created an immediate right to an equitable accounting of the damages that would accrue therefrom. *Town of Miami Springs* does not conflict with this holding nor the law of Florida regarding the time when suits for a breach of fiduciary duty should be brought.

Moreover, the question of how the Florida three-year statute of limitations should be applied under the particular facts of this case presents no important issue for this Court to decide. The opinions of the Courts below, rendered after those Courts had examined all the substantive and procedural aspects of this case, will not have widespread or important impact. This case clearly does not meet the criteria for the granting of certiorari.

3. The Petition For A Writ Of Certiorari Should Be Denied Because The Decision Of The Court Of Appeals Does Not Depart From The Accepted And Usual Course Of Judicial Proceedings.

The District Court, in its order dismissing Petitioner's Complaint (R 130), held as follows:

> "In an action for breach of fiduciary duty, the claim accrues at the time of the wrongful act amounting to a breach of duty. In the instant case, the second amended complaint does not allege the commission of any wrongful act amounting to a breach of fiduciary duty occurring after November 3, 1958. The original complaint was filed on August 3, 1962. It therefore affirmatively appears on the face of the complaint that *the claim is barred by the statute of limitations insofar as it alleges a breach of fiduciary duty.*" (Emphasis added.)

The District Court order then went on to hold that:

> "The claim for unjust enrichment cannot accrue, *if at all,* until such time as the Federal Power Commission's determination of the rate base becomes final. Before such time, the claim is premature and cannot be maintained." (Emphasis added) (R 131-132).

It is important to note that the District Court did not say that the Petitioner had a claim for unjust enrichment. The District Court dismissed the complaint as to all of the Respondents with prejudice as to any claims arising from

a breach of a fiduciary relationship, but without prejudice to the right of Petitioner on his unjust enrichment theory, *if he had one.*

Petitioner appealed from the entire judgment of the District Court and brought all issues below before the Court of Appeals. In his original and reply briefs in the Court of Appeals, Petitioner argued that he had alleged a separate cause of action for unjust enrichment which was neither time-barred nor premature.[6] The Court of Appeals rejected Petitioner's arguments and held that Petitioner had alleged only one cause of action and that cause was based on a breach of fiduciary duty which, as the District Court had held, was barred by limitations. As the Court of Appeals said:

> "The profit-making of the defendants cannot be separated from the damages to the corporation; they are absolutely equivalent. There is no difference, quantitative or qualitative, between the delay in the advent of damages following the execution of the contracts and the delay in the advent of defendants' profits. . . ." (Footnote omitted.) *Ross* v. *Stanley, supra* at 650, *Petition for Cert.* 11a.

Judge Simpson in his concurring opinion in the Court of Appeals stated that:

> "First, I would emphasize that the Complaint here sets forth only one claimed breach of legal duty; only one 'claim' or 'cause of action', not two; only one basis

[6] Petitioner, at page 2 of his original "Brief for Plaintiff-Appellant" filed below with the Court of Appeals, listed five questions to be decided on appeal. The third question, as stated by Petitioner, was: "Are the claims time-barred or premature (R 119-120, 125, 129-132)? (Point III)". Point III A. of that brief, at page 36, specifically asserted that the claim for unjust enrichment was not time-barred. In his "Reply Brief for Plaintiff-Appellant," at page 17, the Petitioner again argued, under Point II A., that the claim for unjust enrichment was not time-barred.

for recovery. The only duality I can discover is in theories of recovery and computation of damages.

"It is sophistry to assert the existence of two claims, one for 'breach of trust' and a separate claim for 'unjust enrichment', giving rise to an equitable right to an accounting. (Footnote omitted.)

* * *

"Our holding, in summary, is: that only one claim, not two, existed; that all, not part of it, was time-barred under the Florida Statute when suit was brought; and that the district court's attempted dichotomy was impermissible, as without legal or factual basis." *Ibid.* at 651, *Petition for Cert.* 13a-14a.

Accordingly, the Court of Appeals held that:

"The judgment of the trial court to the extent that it dismissed the claim as being barred by the statute of limitations is affirmed. The judgment of the trial court is remanded to permit the remainder of the judgment to be amended in a manner not inconsistent with this opinion." *Ibid* at 650, *Petition for Cert.* 12a.

Now Petitioner argues that the Supreme Court of the United States should grant his Petition for Certiorari because the Court below ruled on the very question which he himself had raised. Even if the Petitioner could otherwise bring the action of the Court of Appeals within the fact situations of the cases he cites on page 20 of his Petition for Certiorari, he should not be heard to complain of the action of the Court of Appeals which he himself invited. He has waived any right he may have had to complain of the Court's action in this respect.

Moreover, the action of the Court of Appeals was correct. Unlike the cases cited by Petitioner, here the entire judgment, with all issues, was brought up on appeal by the

Petitioner and fully argued. The Court of Appeals, having decided that only one cause of action was alleged, certainly had the power to affirm the judgment of the trial court which held that cause of action was barred by limitation, and to remand in order to permit the trial court to remove any inconsistencies therein.

CONCLUSION

For the reasons stated, Respondents Florida Gas Company and Florida Gas Transmission Company pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

By .....

ROBERT F. CAMPBELL
SELBY W. SULLIVAN
2500 Humble Building
Houston, Texas 77002

R. Y. PATTERSON, JR.
Post Office Box 44
Winter Park, Florida

Attorneys for Respondents Florida Gas Company and Florida Gas Transmission Company

Of Counsel:

ANDREWS, KURTH,
CAMPBELL & JONES
2500 Humble Building
Houston, Texas 77002

November 10, 1965

PROOF OF SERVICE

I, Robert F. Campbell, one of the attorneys for Florida Gas Company and Florida Gas Transmission Company, among the respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of November, 1965, I served copies of the foregoing Brief on Frank Ross, Petitioner herein, by mailing a copy in a duly addressed envelope, with air mail postage prepaid to William E. Haudek, Attorney for Petitioner, 295 Madison Avenue, New York, New York, 10017. I also served copies of the foregoing Brief on the following:

Charles Jay
Hardee, Jr., Esquire
101 East Lafayette Street
Tampa, Florida

David W. Hedrick, Esquire
Giles, Hedrick & Robinson
125 South Court Street
Orlando, Florida

M. W. Wells, Esquire
Maguire, Voorhis & Wells
135 Wall Street
Post Office Box 633
Orlando, Florida

John Bingham, Esquire
Martin, Balch, Bingham & Hawthorne
600 North 18th Street
Birmingham, Alabama 35203

William E. Sherman, Esquire
Hull, Landis, Graham & French
110 West Indiana Avenue
Post Office Box 358
DeLand, Florida

.....

ROBERT F. CAMPBELL
ANDREWS, KURTH, CAMPBELL & JONES
2500 Humble Building
Houston, Texas 77002